In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72–826

IGNATIUS J. BROUSSARD, JR., PETITIONER

v.

COLONEL RODERICK R. PATTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

After a trial by general court-martial in 1969, petitioner was convicted of having violated Article 85 of the Uniform Code of Military Justice, 10 U.S.C. 885, by deserting from Kadena Air Base, Okinawa, while in active service as an airman first class in the United States Air Force. He was sentenced to confinement at hard labor for four months, reduction in grade to E–1 (airman basic), forfeiture of pay and allowances, and a bad conduct discharge. The Air Force Court of Military Review affirmed, 41 C.M.R. 1004, and a petition for review was denied by the United States Court of Military Appeals, 41 C.M.R. 402. The United States District Court for the Central District of California

denied and dismissed a petition for a writ of habeas corpus and the court of appeals affirmed (Pet. App. 1[1]; 466 F. 2d 816). The question before this Court is whether the courts below properly concluded that habeas corpus was not available for review of the decision of the military courts that his desertion had taken place "in time of war" for purposes of the statute of limitations in the Uniform Code of Military Justice.

The pertinent facts are set forth in the opinion of the court of appeals. Briefly, on October 1, 1964, petitioner deserted from the Air Base at which he was stationed on Okinawa. He remained at large until March 18, 1969, when he was arrested by the Federal Bureau of Investigation. In a letter dated December 6, 1967, the Air Force had informed petitioner's parents that it was making no further effort to apprehend him since he was considered "a peacetime deserter" as to whom the three-year statute of limitations had expired. In a subsequent letter dated February 7, 1969, prior to petitioner's arrest, his parents were informed by the Air Force that it was reactivating its apprehension notices in light of the intervening decision by the United States Court of Military Appeals in *United States* v. *Anderson*, 17 U.S.C.M.A. 588, 38 C.M.R. 386,

[1] Earlier, before petitioner had exhausted his administrative remedies within the military justice system, the district court had denied the petition for a writ of habeas corpus. The court of appeals remanded with directions that the proceeding be held in abeyance until petitioner exhausted his administrative remedies. The denial of relief by the district court at issue here was entered after exhaustion of those remedies (Pet. App. 2).

which held that the statute of limitations did not apply to persons who had deserted after August 10, 1964, since such desertions were considered "in time of war" and the Uniform Code provides no period of limitations for such offenses.

Petitioner contends that the military courts erred in relying on *United States* v. *Anderson, supra,* in holding that because petitioner deserted "in time of war" his prosecution for desertion was not barred by Article 43 of the Uniform Code, 10 U.S.C. 843. But as the court of appeals pointed out, civilian courts have only limited jurisdiction to review the determinations of military courts. Civilian courts are not warranted in granting habeas corpus relief to a serviceman convicted of a military offense, if the military courts gave "full and fair consideration" to his claims of legal error. See generally *O'Callahan* v. *Parker,* 395 U.S. 258; *Toth* v. *Quarles,* 350 U.S. 11; *Burns* v. *Wilson,* 346 U.S. 137; *Hiatt* v. *Brown,* 339 U.S. 103; *Sunday* v. *Madigan,* 301 F.2d 871 (C.A. 9); *Fischer* v. *Ruffner,* 277 F.2d 756 (C.A. 5). Indeed, one of the cases on which petitioner relies, *Juhl* v. *United States,* 383 F. 2d 1009 (Ct. Cl.) (Pet. 6), was reversed by this Court *sub nom. United States* v. *Augenblick,* 393 U.S. 348, 356, on the ground that a court-martial judgment is collaterally reviewable by the civil courts only when the military

trial was "conducted in violation of express constitutional mandates" but not when the only issue is the interpretation or application of military law. Here the military courts have fully, fairly, and finally resolved the question of statutory construction against petitioner, and review of that question on habeas corpus was properly declined.

Petitioner's claim that the Air Force letter of December 6, 1967, acted as a termination of his military status is without merit. The letter was not and did not purport to be a discharge of petitioner from the military or a notice of termination of his military status. It merely served to notify petitioner's parents that the Air Force was ceasing efforts to apprehend petitioner; that notice was rescinded by the subsequent letter of February 7, 1969. Under these circumstances, the general court-martial had jurisdiction over petitioner. The court of appeals found that the military courts fully and fairly considered petitioner's claims on appeal (Pet. App. 3–4). Further review by this Court is thus not warranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

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